

**Dato' Seri Anwar bin Ibrahim v
Tun Dr Mahathir bin Mohamad**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-609
OF 2007
SURIYADI, HELILIAH AND WAN ADNAN MUHAMAD JJCA
15 AUGUST 2008

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*Civil Procedure — Appeal — Appeal to Court of Appeal — Disagreement
between parties as to documents to be included in record of appeal — Whether
such disagreement ought to be determined by High Court Registrar — Powers of
High Court Registrar when determining such disagreement, extent of — Rules of
the Court of Appeal 1994 r 18*

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*Civil Procedure — Appeal — Appeal to Court of Appeal — Record of appeal —
Documents to be included in record of appeal — Whether appellant primarily
responsible for inserting documents and exhibits to memorandum/record of appeal
— Rules of the Court of Appeal 1994 r 18*

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The appellant had appealed to the Court of Appeal against a decision of the High Court in the respondent's favour. In finalising his record of appeal, the appellant's solicitors sought to exclude certain exhibits in a supporting affidavit of the respondent. The appellant's solicitors suggested that the respondent file his own supplementary record or bundle containing the exhibits. The respondent's solicitors did not agree to the exclusion or to the suggestion. The appellant thus applied to the Court of Appeal to determine the index to the record of appeal and the exhibits thereto. The Court of Appeal directed the matter be determined by the High Court registrar pursuant to r 18(6) of the Rules of the Court of Appeal 1994 ('the Rules'). The registrar consequently ordered that all exhibits in the respondent's supporting affidavit be included in the record of appeal. However, the appellant in a second application — the instant application — applied to the Court of Appeal to, inter alia, determine once again the index of the record of appeal and the exhibits thereto.

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Held, dismissing the application to determine the index of the record of appeal and the exhibits thereto:

(1) Rule 18(4) of the Rules clearly ascribed to the appellant the

- A responsibility of attaching the documents (exhibits). There was no question in the instant case of the respondent preparing and attaching some form of supplementary record incorporating the exhibits objected to by the appellant (see para 15); *Re Sateras Resources (M) Bhd* [2006] 3 MLJ 140 referred.
- B (2) In the instant case, the disagreement as to the exhibits had already been referred to the registrar pursuant to r 18(6) of the Rules. Rule 18 is a statutory provision which expressly confers on the registrar of the High Court the authority to make a determination on the inclusion or
- C exclusion of any document. The registrar is also empowered to decide whether the parties should or should not be referred to a judge. In the instant case, the registrar had decided not to refer the parties to a judge (see para 16).
- D (3) Rule 18(4) and r 18(6) expressly prescribe what documents are to be included in a record of appeal, and in the event of disagreement between the parties, the High Court has the judicial authority to make a determination. There is no question of the Court of Appeal intervening in such a disagreement. It would be tantamount to the Court of Appeal derogating to itself some discretion already expressly
- E conferred by the Rules to the High Court where the appeal records are to be finalised. Even if there were to be some form of *casus omissus* it is not for the Court of Appeal to fill in (see para 19).
- F (4) Section 44 of the Courts of Judicature Act 1964 was not applicable in the instant case. There was also no provision equivalent to r 137 of the Rules of the Federal Court 1995 that could be invoked by the Court of Appeal. There was no room in the instant case for judicial activism as it would amount to re-writing the rules for the convenience of the parties (see para 20).

G **[Bahasa Malaysia summary]**

- H Perayu telah merayu ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi menyebelahi responden. Dalam menyelesaikan rekod rayuannya, peguam perayu memohon untuk dikecualikan ekshibit tertentu dalam affidavit sokongan responden. Peguam perayu mencadangkan bahawa responden memfailkan rekod atau ikatan tambahannya sendiri yang mengandungi ekshibit-ekshibit. Peguam responden tidak bersetuju dengan pengecualian atau cadangan tersebut. Perayu oleh itu telah memohon kepada
- I Mahkamah Rayuan untuk menentukan indeks kepada rekod rayuan dan ekshibit-ekshibit tersebut. Mahkamah Rayuan telah mengarahkan agar perkara tersebut ditentukan oleh pendaftar Mahkamah Tinggi menurut k 18(6) Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah-Kaedah'). Pendaftar tersebut kemudiannya telah memerintahkan agar kesemua ekshibit

dalam affidavit sokongan responden disertakan dalam rekod rayuan tersebut. Walau bagaimanapun, perayu dalam permohonan kedua — permohonan ini — telah memohon kepada Mahkamah Rayuan untuk, antara lain, menentukan sekali lagi indeks rekod rayuan dan ekshibit-ekshibit tersebut.

Diputuskan, menolak permohonan untuk menentukan indeks rekod rayuan dan ekshibit-ekshibit tersebut:

- (1) Kaedah 18(4) Kaedah-Kaedah dengan jelas menganggap perayu bertanggungjawab melampirkan dokumen-dokumen tersebut (ekshibit-ekshibit). Dalam kes ini tiada persoalan tentang responden menyediakan dan melampirkan suatu bentuk rekod tambahan bagi memasukkan ekshibit-ekshibit yang dibantah oleh perayu (lihat perenggan 15); *Re Sateras Resources (M) Bhd* [2006] 3 MLJ 140 dirujuk.
- (2) Dalam kes ini, pertentangan terhadap ekshibit-ekshibit tersebut telahpun dirujuk kepada pendaftar menurut k 18(6) Kaedah-Kaedah. Kaedah 18 adalah peruntukan statutori yang secara nyata memberikan pendaftar Mahkamah Tinggi kuasa untuk membuat penentuan tentang pemasukan atau pengecualian apa-apa dokumen. Pendaftar juga diberi kuasa untuk memutuskan sama ada pihak-pihak patut atau tidak patut dirujuk kepada hakim. Dalam kes ini, pendaftar telah memutuskan untuk tidak merujuk pihak-pihak kepada hakim (lihat perenggan 16).
- (3) Kaedah 18(4) dan k 18(6) dengan jelas menetapkan dokumen-dokumen yang patut dilampirkan dalam rekod rayuan, dan sekiranya terdapat pertentangan antara pihak-pihak, Mahkamah Tinggi mempunyai kuasa kehakiman untuk membuat penentuan. Tiada persoalan tentang Mahkamah Rayuan campur tangan dalam pertentangan sebegini. Ia sama seperti Mahkamah Rayuan mengurangkan budi bicaranya yang telah jelas diberikan oleh Kaedah-Kaedah kepada Mahkamah Tinggi di mana rekod-rekod rayuan perlu diselesaikan. Meskipun patut terdapat suatu bentuk *casus omissus* ia bukan untuk Mahkamah Rayuan memainkan peranan (lihat perenggan 19).
- (4) Seksyen 44 Akta Mahkamah Kehakiman 1964 tidak terpakai dalam kes ini. Tiada juga peruntukan yang sama dengan k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 yang boleh digunakan oleh Mahkamah Rayuan. Dalam kes ini tiada ruang untuk dasar aktivis kehakiman kerana ia akan mengakibatkan penulisan semula kaedah-kaedah untuk kesesuaian pihak-pihak (lihat perenggan 20).]

Notes

For cases on appeal to Court of Appeal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 742–756.

A Cases referred to

Sateras Resources (M) Bhd, Re [2006] 3 MLJ 140, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 44

- B** Rules of the Court of Appeal 1994 rr 4, 18(4), 18(6)
Rules of the Federal Court 1995 r 137

- C** **Appeal from:** Civil Suit No S4–23–15 of 2006 (High Court, Kuala Lumpur)
[2007] 5 MLJ 406

Sankara Narayan Nair (Wan Anuar Shaddat bin Mohamed Amin and Raja Aziz Addruse & Param Cumaraswamy with him) (SN Nair & Partners) for the appellant.

VK Lingam (VK Lashmi with him) (VK Lingam & Co) for the respondent.

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Heliliah JCA (delivering judgment of the court):

- E** [1] Enclosure 4(a) was a notice of motion which was filed by the appellant/applicant and contained two prayers. The first (prayer (a)) sought leave for extension of time to file and serve the record of appeal. This was granted without any difficulty or objection from the respondent (that is in respect of both the appeal and the motion itself). Hereafter both parties are to be referred as the appellant and the respondent.

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[2] It is the second prayer (prayer (b)) which has raised issues which warrant written grounds being furnished. In prayer No 2 the appellant was seeking that the index of the appeal record and the exhibits thereto are to be determined by the Court of Appeal.

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[3] Due to the unusual nature of the application it is very necessary to divulge the background leading to this application.

- H** [4] It was explained, before us, when the matter was being heard that previously on 29 January 2008 the same application had also been heard by another panel of the Court of Appeal. It was determined then that pursuant to r 18(6) of the Rules of the Court of Appeal 1994 the matter should be determined by the registrar of the High Court as specifically provided therein.
- I** Rule 18(6) of the Rules of the Court of Appeal 1994 ('the COA Rules 1994') states:

18(6) A draft index of the documents to be included in the record of appeal shall be sent by the appellant's solicitors to the solicitors for the respondent who or (if more than one) any of whom may within forty-eight hours object to the

inclusion or exclusion of any document. In the event of the parties being unable to agree, *the matter shall be referred to the Registrar of the High Court who may require the parties to attend before a Judge of the said Court. The Registrar of the High Court as well as the parties shall endeavour to exclude from the record all documents* (more particularly such as are merely formal) that are not relevant to the subject matter of the appeal taking special care to avoid the duplication of documents and unnecessary repetition of headings and other merely formal parts of documents. Where in the course of preparation of the record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists on its being included, the record, as finally printed or typed shall, with a view to the subsequent adjustment of the costs of and incidental to such documents, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

(Emphasis added.)

[5] The matter has been argued before the registrar of the High Court on 3 April 2008 who by a decision delivered on 9 April 2008 ordered that all exhibits in the respondent's affidavit in support must be included. The respondent's affidavit in support in the context of the appellant's case refers to the affidavit in support filed by the respondent dated 4 January 2007 in furtherance of the respondent's application to strike out dated 5 January 2007. The application to strike out was made in response to a defamatory action instituted by the appellant against the respondent in Civil Suit No S4-23-15 of 2006. The respondent was successful in the application to strike out and hence an appeal was lodged by the appellant.

[6] It was in the course of finalising the index to the record of appeal that the appellant had sought to exclude certain exhibits. Exhibits were to be incorporated as Part C of the record of appeal. Learned counsel for the appellant by letter dated 15 August 2007 had transmitted a copy of the draft index of the record of appeal to learned counsel for the respondent for approval. By a letter dated 20 August 2007 counsel for respondent then sent a reply which stated, inter alia:

... Please note that you have omitted the following Exhibits as exhibited in the Defendant's supporting affidavit dated 4.01.2007. Kindly take notice that if the exhibits are not included in the Appeal Record we will consider that the Appeal Record is incomplete and defective and our client will take steps to strike off your client's Appeal.

[7] It is noted that in the same letter learned counsel for the respondent enclosed an amended draft index enclosing the list of exhibits that had been omitted in the draft index of exhibits prepared by learned counsel for the appellant.

A [8] The amendment that was suggested to be included in *Bahagian C Indeks Rekod Rayuan* as suggested specifies as follows:

16 Senarai Ekshibit-Ekshibit Plaintiff (Defendant?)

B Ekshibit-Ekshibit 'MM-1' hingga 'MM-20' seperti yang dilampirkan muka surat 1 hingga muka surat 5.

C [9] Learned counsel for the appellant in response to this suggestion countered, inter alia, as follows in the letter dated 21 August 2007:

... We are however not agreeable to paragraph 8, 20, 22, 23, 25 to 27 as they are cases and ought to be rightfully placed in your bundle of authorities. We are also not agreeable to paragraphs 26 as we do not wish to make reference to them at all and such we suggest that you make your own copies of the same for your reference at the appeal.

D [10] This same letter of 21 August 2007 also included a suggestion that the parties seek an appointment with the registrar for directions.

E [11] As elucidated above the outcome of the endeavours to finalise the draft index for the appeal record resulted not only in a previous application being made before the Court of Appeal and a direction for the matter to be emplaced before the registrar of the High Court pursuant to r 18(6) of the Rules of the Court of Appeal 1994.

F [12] Enclosure 4(a) therefore constitutes a second attempt by the appellant seeking the Court of Appeal to determine (*ditentukan oleh mahkamah*) the index to the record of appeal and its exhibits.

G [13] Learned counsel for the appellant has indicated that several of the exhibits that are sought to be included are irrelevant. The exhibits are identified as 'MM-1' to 'MM20'. Objections are being made to exhs 'MM-8', 'MM-20', 'MM-22', 'MM-23', 'MM-25' to 'MM-27'.

H [14] Objections to these exhibits are premised on the basis that those exhibits being cases which have been fully reported and hence should actually become part of the respondent's bundle of authorities. Learned counsel for the appellant has submitted that the respondent's application to strike out the action on defamation was grounded on estoppel and hence arising from the High Court decision to strike out the writ, it would accordingly render further reference to those decision which include decision made by the Federal Court irrelevant. Entwined to this is the submission that the resultant effect would be 24,000 pages of documents might have to be brought in.

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Reliance is emplaced on the following provision of the Rules of the Court of Appeal 1994 that r 18(4) which states:

- (4) The appellant *shall* attach to such memorandum *copies of the proceedings in the High Court* including —
- (c) copies of *all affidavits* read and of all documents put in evidence in the High Court *so far as they are material* for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified transaction thereof.

[15] It is clear from the above mentioned provision that the appellant is the party ascribed with the responsibility of attaching the documents. As pointed out by learned counsel for the respondent, there is no question here of the respondent preparing and attaching some form of supplementary record incorporating the exhibits objected to by the appellant. The point however on the determination of what is material or otherwise has been dwelt upon in *Re Sateras Resources (M) Bhd* [2006] 3 MLJ 140 the relevant passage in the statement of Abdul Kadir Sulaiman JCA is:

On the issue of the breach of the various provisions of the Court of Appeal Rules 1994, this court in *Low Cheng Soon v TA Securities Sdn Bhd* [2003] 1 MLJ 389 held that the word 'shall' used in r 18 (4)(c) of the Rules reflects a measure of mandatoriness in it. This is a mandatory rule and must be strictly adhered to. Since the rule speaks of 'all documents put in evidence', this meant that the appellant had to include all the exhibits produced before the High Court. It was not for the appellant's counsel to decide or say that only two exhibits were material. It was for the court to decide which exhibits were material and relevant to the appeal. The court also held that the importance of the rules of the court cannot be ignored as otherwise the courts would be faced with endless problems involving the administration of justice.

[16] In the circumstances of this arising from the objections posed by the appellants to the inclusion of several exhibits the matter has in accordance with r 18(6) already been referred to the registrar of the High Court. This rule is in itself a statutory provision which has expressly conferred on the registrar of the High Court the authority to make a determination on the inclusion or exclusion of any document. The registrar is also empowered to decide whether the parties should or should not be referred to a judge which in this case the registrar has decided that the matter should not.

[17] Learned counsel for the appellant has contended that there is here simply a matter of interpretation of the Rules of the Court of Appeal 1994.

A This is indeed what this court is required to do. However in addition to the aforementioned the following are the additional reasons.

[18] Rule 4 of the Rules of the Court of Appeal 1994 provides:

B 4 Where no other provision is made by any written law or by there Rules, the procedure and practice in the Rules of the High Court 1980 shall *mutatis mutandis* apply.

C [19] Rule 18(4) and r 18(6) have expressly provided what documents are to be included and in the event of disagreement between the parties, it is the High Court which is the judicial authority to make a determination. Hence there is here no question of the Court of Appeal intervening on such a question. It would be tantamount to the Court of Appeal derogating to itself some discretion already expressly conferred by the Rules of the Court of Appeal 1994 to the High Court where the appeal records are to be finalised. Even if there were to be some form of *casus omissus* it is not for this court to fill it in.

E [20] The parties have conceded that s 44 of the Courts of Judicature Act 1964 is also inapplicable. There is therefore no question here of invoking some inherent discretion obliquely. This becomes even more apparent in view of the fact that there is no provision equivalent to r 137 of the Rules of the Federal Court 1995 that could be invoked by the Court of Appeal. To emphasise the matter, there is no room here for judicial activism as it would be tantamount to rewriting the Rules for the convenience of the parties.

[21] Consequently prayer (b) in encl 4 (a) is disallowed while prayer (a) is allowed.

G [22] Learned counsel for the respondent has requested this court to put on record that the question of costs to be borne following from the inclusions of the exhibits will be an issue that will be raised before the Court of Appeal when the appeal proper is being heard.

H *Application to determine the index of the record of appeal and exhibits thereto dismissed.*

Reported by Andrew Christopher Simon

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